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In the Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether employer contributions to union trust funds for health and welfare, pension, and training are "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 670 F. 2d 208. The opinions of the Benefits Review Board (Pet. App. 17a-22a, 28a-35a) are reported at 12 B.R.B.S. 87 and 6 B.R.B.S. 754. The opinions of the administrative law judges (Pet. App. 23a-26a, 36a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981. A petition for rehearing was denied on January 14, 1982. The petition for a writ of certiorari was filed on April 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From November 1973 until he was fatally injured while performing construction work in the District of Columbia in April 1974, James H. Hilyer was employed by petitioner Morrison-Knudsen Construction Company (Pet. App. 29a). Under the collective bargaining agreement in effect during that time, for each hour that each employee worked, Morrison-Knudsen was required to pay 28 cents into a health and welfare fund, 35 cents into a pension fund, and five cents into a training fund (*id.* at 6a). These funds provide employee benefits such as life insurance, health insurance, retirement benefits, and career training. The contributions were made directly to the trust funds, not the employees, and the individual employees had no role in the funds' management (*id.* at 9a).

Immediately upon Hilyer's death the company began paying death benefits to his widow, respondent Sonia Hilyer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C. 901 *et seq.*, which is made applicable to employment in the District of Columbia by D.C. Code Ann. § 36-501 (1973) (Pet. App. 5a-6a). Under 33 U.S.C. 909, the weekly death benefit due respondent Hilyer was 66-2/3% of her husband's average weekly wage as determined under 33 U.S.C. 910.

Respondent Hilyer disputed the amount of the benefits being paid her, contending, *inter alia*, that calculation of her husband's "average weekly wage" erroneously failed to include his employer's contributions to the three union trust funds. An administrative law judge rejected her contention (Pet. App. 7a), and the Benefits Review Board affirmed that portion of his order (*id.* at 33a).[1] The Board ruled that the

[1]The Board remanded for reconsideration of the attorney's fees award (Pet. App. 34a). On remand, an administrative law judge entered a new award (*id.* at 24a-26a), which subsequently was modified by the Board (*id.* at 17a-22a).

statutory definition of "wages" in 33 U.S.C. 902(13) made clear that only those "values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage" (Pet. App. 32a). It found the value of the trust fund contributions too "speculative" to be considered wages (*id.* at 33a). It also noted that inclusion of these forms of benefits would cause problems in computing an employee's average weekly wage by comparison to a similarly-situated employee under 33 U.S.C. 910(b) in cases, such as Hilyer's, where the injured employee did not work in the same employment for a full year (*ibid.*).

2. The court of appeals reversed (Pet. App. 4a-16a). It concluded that the employer's benefit fund contributions on Hilyer's behalf were identifiable, calculable values that must be included in the determination of Hilyer's average weekly wage (Pet. App. 8a-9a). Although the contributions were made, not to the employees, but to union funds over which individual workers had no control, the court found that the funds were a "channel" for the company to provide benefits to its employees (*id.* at 9a). The court also found that each of the benefits had "substantial economic value" to the employees because without the funds the employees would have had to spend their own money to obtain similar benefits (*ibid.*). Recognizing that the sums contributed by the employer to the funds probably would not purchase equivalent benefits on the open market, the court nonetheless concluded that "the most reasonable course is to measure the value of the fringe benefits by the amount of the employer's contributions to the benefit funds" (*id.* at 12a).

DISCUSSION

1. The decision of the court of appeals upsets a long-established administrative construction of the LHWCA. From the inception of the Act, the Department of Labor has taken the position that fringe benefit contributions are

not included within "wages" as defined in the LHWCA. See United States Department of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, *LS/WH Program Memorandum No. 32* (June 17, 1968) (reprinted at American Insurance Association Amicus Br. App. 1a-4a).[2] The Benefits Review Board, the administrative body that hears appeals from the administrative law judge in all LHWCA cases, also has consistently held that fringe benefits are not "wages" for the purposes of computing LHWCA benefits. See, *e.g., Collins* v. *Todd Shipyards Co.*, 5 B.R.B.S. 334 (1977). The change in benefit computation compelled by the decision below is of great importance. It will result in a substantial increase in LHWCA benefits in many cases, which will require considerable readjustment in the insurance process of anticipating the level of future benefits. Moreover, under the old interpretation, computation of compensation benefits was relatively simple and certain.[3] The new rule will likely result in

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[2]The Department of Labor briefly departed from this longstanding interpretation in the litigation of this case before the court of appeals. The Director of the Office of Workers' Compensation Programs petitioned for review of the Benefits Review Board's order and contended that the employer's fund contributions here should have been included in determining Hilyer's average weekly wage. Upon further consideration, the Department of Labor has concluded that the correct interpretation of the LHWCA is that fringe benefits are not wages within the meaning of the Act, thus reverting to its previous, longstanding interpretation. The Director has urged this view in a brief filed in two consolidated cases now pending in the Ninth Circuit, *Duncanson-Harrelson Co.* v. *Director, OWCP*, No. 79-7093, and *Freer* v. *Duncanson-Harrelson Co.*, No. 79-7094, and he has apprised the Fifth Circuit of his position in connection with its consideration of *Levis* v. *Farmers Export Co.*, No. 81-4258, and *Waters* v. *Farmers Export Co.*, No. 81-4273.

[3]With minor exceptions, only monetary compensation served as the base, and the vast majority of claims were not disputed. Of the contested claims, many were resolved by informal conferences conducted by Labor Department claims examiners without resort to formal hearings before administrative law judges and subsequent appeals, which introduce significant delays into the process.

a significant increase in litigation over LHWCA awards in order to resolve new questions raised by the inclusion of fringe benefits in the base for computing those awards.

The decision below is the first judicial decision to reject the view that LHWCA wages do not include fringe benefits, but its effect is far-reaching. Because of the decision of the court of appeals in this case, the Benefits Review Board has abandoned its earlier position and held that it will now include fringe benefits in the computation of LHWCA wages. *Minick* v. *Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), slip op. 6-7.[4] Thus, at least at the administrative level, all claims for benefits under the LHWCA will be governed by the decision below.

Although we would not normally urge the Court to review the first appellate decision on an issue, several practical considerations suggest that course here. Two cases raising the fringe benefits issue are currently pending in other courts of appeals (see note 2, *supra*); because of the importance of the issue presented and the fact that the decision below is erroneous, it is almost inevitable that a conflict requiring resolution by this Court will arise. In the meantime, the Board's stated intention to apply the court of appeals' decision on a nationwide basis will require substantial efforts by insurers to readjust the workers' insurance program to account for the higher benefit payments that will result. And the ruling will almost certainly increase the caseload of an already overburdened LHWCA administrative system[5] by requiring the determination of new, related

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[4]The Director has moved the Board to reconsider its decision in *Minick*. We are lodging a copy of the decision with the Clerk of this Court.

[5]A recent government study has found that the LHWCA administrative staff is not sufficient to handle its present workload. Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 30-32 (Apr. 1982). Excluding District of Columbia claims, 59,594 lost-time injuries were

questions such as which fringe benefits must be included in wages and how their value is to be determined—questions that will not arise if the court of appeals' decision is reversed. In the interest of judicial and administrative economy, it is appropriate for the Court to minimize these consequences by acting now to resolve the uncertainty created by the decision below, which threatens both the employees' interest in ~~reaching~~ receiving a prompt and certain recovery and the employers' interest in precise identification of their contingent liabilities. See *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 282 (1980).

2. In addition to the importance of resolving the uncertainty created by the court of appeals' decision, further review is necessary here because the decision below misinterprets the LHWCA. "Wages" are expressly defined in the LHWCA, 33 U.S.C. 902(13), as "the money rate at which the service rendered is recompensed * * *, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities * * *." The plain meaning of this definition does not encompass employer contributions to benefit funds; it appears restricted to actual payments made to the employee or traditional wage substitutes provided directly to him, such as room and board. In the absence of any contrary indication in the legislative history, this plain meaning should control. Moreover, recourse to other evidence strongly confirms the apparent meaning of the statutory language. See, *e.g.*, *United States* v. *Clark*, No. 80-1121 (Jan. 12, 1982), slip op. 6.

Congress' treatment of the concept of wages in the analogous context of the Davis-Bacon Act, 40 U.S.C. 276a,

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reported in fiscal year 1980. *Id.* at 31. The Office of Workers' Compensation Programs estimates that approximately 75% of these injuries resulted in compensation payments.

indicates the error of the decision below. The Davis-Bacon Act provides that wages paid on federally funded construction projects should accord with prevailing local wages. In 1964, the Davis-Bacon Act was amended by inserting a definition of "wages," 40 U.S.C. 276a(b), to establish that benefit fund contributions would be considered wages for the purposes of the Act. In making this change, Congress explained that such fringe benefits were rare when the Davis-Bacon Act was enacted in 1931 (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)); hence, the existing statute did not include those fringe benefits and congressional action was necessary to cover trust fund contributions. By the same token, Congress could not have contemplated when it passed the LHWCA in 1927 that trust fund contributions would be included in the wage base for benefits, and Congress' failure to amend the LHWCA as it did the Davis-Bacon Act suggests that these contributions are not LHWCA "wages." See *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 31-32 (1959). This conclusion is buttressed by the longstanding administrative interpretation excluding fringe benefits and the fact that employers and insurers have long ordered their affairs on this basis. See *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978).

Decisions of this court in other contexts also suggest that fringe benefits such as those involved here should not generally be encompassed within the definition of "wages." In *United States* v. *Embassy Restaurant, Inc., supra*, the Court held that employer contributions to trust funds for the benefit of employees were not entitled to the priority given by the old Bankruptcy Act, 11 U.S.C. 104(a)(2), to "wages * * * due to workmen." The Court explained that "not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to

employment" (359 U.S. at 32); accordingly, congressional action was necessary for such trust fund contributions to be treated as wages (*id.* at 35).[6] See also *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977) (pension benefits are not like wages for the purposes of veterans' seniority rights); *Joint Industry Board* v. *United States*, 391 U.S. 224 (1968) (unpaid contributions to annuity plan are not "wages" under 11 U.S.C. 104(a)(2)). *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957), on which the court of appeals relied (Pet. App. 11a-12a), also lends support to this view. While the Court there did find that a federal contractor's surety was liable under the Miller Act, 40 U.S.C. 270a *et seq.*, for employer trust fund contributions, the Court later explained in *Embassy Restaurant* (359 U.S. at 34-35) that *Carter* turned on the fact that the language of the Miller Act covered, not wages, but all "sums justly due" to employees. Indeed, the *Carter* Court specifically noted that the contributions there, by the explicit terms of the trust agreement, were not to be deemed wages. 353 U.S. at 214, 217.

In addition, including these fringe benefits within the wage base for LHWCA compensation leads to results that Congress could not have intended. First, because of the varied nature of fringe benefits, calculation of LHWCA compensation may become substantially more complicated and contentious, which would disrupt the Act's goal of prompt and certain disposition of benefits. See, *e.g.*, *Norton* v. *Warner Co.*, 321 U.S. 565, 568 (1944). Second, increasing LHWCA benefits to reflect employer trust contributions not paid to employees substantially increases the possibility that a disabled employee will receive disability benefits that

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[6] In the new Bankruptcy Code, Congress has directly addressed this question and has drawn an explicit distinction for priority purposes between wages and fringe benefits like the trust fund contributions involved in this case. See 11 U.S.C. (Supp. IV) 507(a)(3), (4).

exceed the take-home pay he was earning when employed, thus giving him a disincentive to return to work. See *Potomac Electric Power Co.* v. *Director, OWCP, supra*, 449 U.S. at 290 n.9 (Blackmun, J., dissenting); cf. *MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 110-111 (1944) (practical considerations must be taken into account in evaluating congressional intent under the LHWCA).[7] Moreover, at least in the case of some employer trust contributions, it makes no sense to include them in the base for computing post-injury benefits. For example, some of the contributions involved here went to a fund that provided an insurance policy on James Hilyer's life. Respondent Sonia Hilyer has received the full benefit of those contributions as the beneficiary of the life insurance policy; there is no need to carry those trust contributions over into her LHWCA death benefit because she does not have to bear the expense of paying premiums on an insurance policy on James Hilyer's life.

In sum, it is appropriate for the Court to grant review here in order to resolve the uncertainty and minimize the adverse consequences created by the court of appeals' erroneous departure from the longstanding administrative interpretation of the LHWCA.

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[7]Because of the tax-free nature of LHWCA benefits and the availability of payments from other sources, this disincentive already exists in some cases (see *Longshoremen's and Harbor Workers' Compensation Act Needs Amending, supra*, at 13-17, 26), but the problem will be exacerbated by the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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